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INSURANCE-SUBROGATION-RIGHT OF INSURED TO RECOVER ON AN AUTOMOBILE "COLLISION" POLICY AFTER FULL SETTLEMENT WITH THE NEGLIGENT WRONGDOER

Robert W. Shadd S.Ed.
University of Michigan Law School

INSURANCE—SUBROGATION—RIGHT OF INSURED TO RECOVER ON AN AUTOMOBILE "COLLISION" POLICY AFTER FULL SETTLEMENT WITH THE NEGLIGENT WRONGDOER—Respondent, whose automobile was covered by a policy of "collision" insurance in appellant insurance company, suffered serious personal injuries and complete loss of his car as a result of a collision with an oil company truck. Despite numerous telephone calls, appellant failed to settle for the cash value of the automobile, as required by the insurance contract. In the meantime, respondent brought an action against the oil company, joining the claims for personal injury and property damage, and executed a full release to that company in return for a settlement of $20,000. He then brought this action for actual damages to the automobile on the theory that appellant fraudulently breached its contract, knowing that respondent had to claim all elements of damage in the oil company suit.[1] Appellant defended on the ground that respondent's release destroyed appellant's right of subrogation and discharged appellant's contractual liability. *Held,* appellant, by its conduct in failing to pay the loss when reported, waived all subrogation rights. The verdict of the jury in the present action was for $400 less than the value of the automobile and that sum represented a reasonable proportion of the $20,000 settlement allocable to the car loss. *Powers v. Calvert Fire Ins. Co.,* (S.C. 1950) 57 S.E. (2d) 638.

Subrogation is the equitable right, acquired by an insurer upon the voluntary payment of a sum of money for which it is only secondarily liable, to pursue the remedies of the insured against a third person wrongdoer.[2] In automobile insurance cases, the insurer may usually abrogate its contract if the insured releases the tort-feasor prior to payment, thus destroying the insurer's possible subrogation rights; or it may recoup payments made to an insured who subsequently releases

[1] Holcombe v. Garland & Denwiddie, Inc., 162 S.C. 379, 160 S.E. 881 (1931).

[2] Billings, "The Significance of Subrogation in Automobile Insurance Practice," 308 INS. L.J. 707, 708 (1948).

the wrongdoer.[3] Because it *is* an *equitable* right, however, subrogation will or will not be enforced "according to the dictates of equity and good conscience,"[4] and the right may be abandoned or waived by conduct, in which case the insurer may be estopped from defending an action on the ground that the insured has settled with and released the wrongdoer.[5] In the principal case, the appellant's failure seasonably to settle the claim[6] placed the respondent in a very disadvantageous position. The law required him to sue upon his personal injuries and property damage in one action or lose the omitted claim. Either way, judgment or settlement would release the negligent wrongdoer and give the insurer a basis for claiming a defense to a subsequent action against it. The chances were that any property damages awarded by a jury, against the oil company, would not be so large as the amount properly collectible from the insurance company. "The remedy for the apparent dilemma lay in the appellant's hands. It could have paid the loss, as it was obligated under its policy, and preserved its right of subrogation."[7] On these facts, it is submitted that the court in the principal case reached the only logical result. It answered appellant's claim that respondent was gaining double compensation for his loss by allowing the jury to determine that proportion of the oil company settlement properly allocable to the property damage. While this undoubtedly involved a great deal of "second guessing" by the jury, the appellant created the situation in the first instance and can hardly be heard to complain.[8] Insurance company attorneys have long argued that a liberalization

[3] Id. at 708. See, also, 6 APPLEMAN, INSURANCE LAW AND PRACTICE §4093 (1942); 8 COUCH, CYC. OF INSURANCE LAW §§2001-2003 (1931); RICHARDS, LAW OF INSURANCE, 4th ed., §57 (1932); VANCE, LAW OF INSURANCE, 2d ed., 675 (1930) and 14 A.L.R. 192 (1921) supplemented by 26 A.L.R. 431 (1923) and 54 A.L.R. 1458 (1928). Some authority holds that an insured's rights are not barred by a settlement with the tort-feasor for less than the liability, such settlement being available to the insurer only as a defense pro tanto to the extent of the amount paid. Fire Assn. of Philadelphia v. Wells, 84 N.J.Eq. 484, 94 A. 619 (1915).

[4] 46 C.J.S., Insurance §1209 (1946).

[5] 16 APPLEMAN, INSURANCE LAW AND PRACTICE §9088 (1944); 73 U.S. L. REV. 301, 302 (1939); Fire Assn. of Philadelphia v. Schellenger, 84 N.J. Eq. 464, 94 A. 615 (1915); Leonard v. Bottomley, 210 Wis. 411, 245 N.W. 849 (1932); Firemen's Fund Ins. Co. v. Thomas, 49 Ga. App. 731, 176 S.E. 690 (1934); Everett v. Metropolitan Life Ins. Co., 129 Neb. 386, 261 N.W. 575 (1935); Firemen's Ins. Co. v. Georgia Power Co., 181 Ga. 621, 183 S.E. 799 (1935) and Weber v. United Hardware and Implement Mutuals Co., 75 N.D. 581, 31 N.W. (2d) 456 (1948). If the acts relied on for waiver are those of an agent, it must expressly appear he was authorized to act. 8 COUCH, CYC. OF INSURANCE LAW §2035 (1931).

[6] The insurer must be given a reasonable amount of time in which to investigate and pay a loss. 14 A.L.R. 193 (1921) and cases cited; SIMPSON, THE LAW RELATING TO AUTOMOBILE INSURANCE, 2d ed., §185 (1928).

[7] Principal case at 641. Where an insurer pays a loss and sues the tort-feasor, the latter cannot set up the insured's recovery in a personal injury action as a defense since the insured no longer had a cause of action for property damage. That had passed to the insurer. See 14 A.L.R. 192 (1921).

[8] Where an insurer has already paid a claim and the insured then sues the tort-feasor for personal injuries, the insurer joining in the action, Minnesota requires the insurer to ask the jury for a special finding on what portion of the verdict constitutes recovery for property damage. See 42 COL. L. REV. 1368 (1942). There is some little authority for the solution adopted in the principal case. See Sun Ins. Office v. Hohenstein, 128 Misc. 870, 220 N.Y.S. 386 (1927). These subrogation defenses seldom arise, at least where small

of subrogation rules, in favor of insurers, might beneficially result in substantial savings to the insuring public by helping to reduce high premium rates,[9] but several surveys have shown that any recovery by an insurer on a subrogated claim is unexpected, and that "collision" insurance premiums are calculated on an indemnity basis, regardless of insured's freedom from fault.[10]

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amounts are involved, probably because the insurance companies fear adverse publicity and, in addition, realize the improbability of their winning jury cases.

[9] Billings, "The Significance of Subrogation in Automobile Insurance Practice," 308 INS. L.J. 707, 714 (1948) and 4 CAN. BAR REV. 713 (1926).

[10] CROBOUGH AND REDDING, CASUALTY INSURANCE 309 (1928); 42 COL. L. REV. 1368 (1942).